IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-795

RODOLFO MEDINA-HERRERA,

Petitioner,

VS.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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Rodolfo Medina-Herrera, petitions for a Writ of Certiorari to review the Judgment of the United States Court of Appeals for the Seventh Circuit.

OPINION BELOW

The Opinion of the Court of Appeals (Group Appendix A, *infra*, pp. A1-A12) is not yet reported.

JURISDICTION

The opinion of the Court of Appeals for the Seventh Circuit was entered on October 1, 1979. A timely petition for rehearing was filed; same being denied on October 26, 1979 (Appendix B, *infra*). This petition is filed within thirty (30) days of that date and this Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether petitioner's Sixth Amendment [right to counsel] rights were violated where his retained counsel also represented two (2) co-indictees within the same federal conspiracy indictment and . . . where the court made absolutely no inquiry as to the possibility of prejudice?

1A. Whether the Sixth Amendment right to effective assistance of counsel was violated by the mere possibility, however remote, that a conflict of interest may exist? (Cf., *Cuyler v. Sullivan*, cert. granted, ... U.S. ....., ... S.C. ....., 26 CrL 4002 (1979)?

1B. Whether the Court of Appeals erred in applying the wrong standard as relating to Sixth Amendment conflict of interest [burden on defense counsel to ascertain conflict as opposed to duty upon the trial court to make inquiry where same counsel represented three (3) co-indictees under the same conspiracy indictment]?

1C. Does *Holloway v. Arkansas*, 435 U.S. 475, 98 S.Ct. 1173 (1978), require reversal where prejudice is shown and the trial court made absolutely no inquiry on the subject of conflict of interest?

1D. Whether the above questions require particularly close scrutiny where [as here] neither the petitioner nor the co-indictees spoke English?

1E. Whether certiorari is appropriate to review the Sixth Amendment question in this case where the court below made absolutely no inquiry as to "conflict of interest", particularly in light of the lack of uniformity in the circuits on this question and in light of certiorari being granted in *Cuyler v. Sullivan*, 26 CrL 4002 (1979)?

2. Whether the Double Jeopardy Clause of the Fifth Amendment precluded petitioner from being convicted on retrial . . . where a new trial had been granted based upon the government's closing argument during petitioner's first trial where the trial judge stated: "Although I am going to deny the motion, I think you deliberately tried to prejudice the jury by bringing this out" (and, post-trial, the trial judge granted a new trial solely on the ground of prosecutorial misconduct during closing argument)?

2a. Whether, under such circumstances, was there such deliberate prosecutorial overreaching so that the Double Jeopardy Clause barred retrial?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

AMENDMENT [V.]

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT [VI.]

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

In part, 21 U.S.C. § 846 reads:

> "Any person who attempts or conspires to commit any offense defined in this subchapter is punishable by imprisonment or fine or both which may not exceed the maximum punishment prescribed for the offense, the commission of which was the object of the attempt or conspiracy".

A.B.A. Standards:

ABA, Standards Relating to the Administration of Criminal Justice—The Function of the Trial Judge § 3.4(b), at 171 (1974):

> "Whenever two or more defendants who have been jointly charged, or whose cases have been consolidated, are represented by the same attorney, the trial judge should inquire into potential conflicts which may jeopardize the right of each defendant to the fidelity of his counsel."

STATEMENT OF THE CASE

Petitioner and others were charged in Chicago, Illinois, under Indictment 77 CR 900 with various drug offenses including conspiracy, all in violation of 21 U.S.C. § 841(a)(1) and 21 U.S.C. § 846. The acts for which petitioner and others were charged were alleged to have occurred in Chicago, Illinois, between September 8, and September 22, 1977.[1] Petitioner along with a guilty pleading co-indictee, Alcantar, were represented by the same retained counsel (O.R. 6-9). The trial court found that retained counsel represented a third co-indictee, Lopez. Lopez had posted bail and fled prior to trial.[2]

Petitioner, while enlarged on bond, stood trial in Chicago, before a jury. At the close of the government's case three (3) substantive counts were dismissed by the Court and on February 17, 1978, the jury returned a guilty verdict as to the conspiracy count. The co-indictee, Alcantar, pled guilty on February 14, 1978, and did not testify as either a defense or government witness.[3] Some of the crucial trial facts on the conflict of interest would reveal that Alcantar sold a quantity of heroin to a D.E.A. agent in Chicago, Illinois, on

[1] The indictment is reproduced at O.R. 2 in the original record.

[2] Petitioner, after his second trial, retained new counsel. Petitioner, post-trial, raised both conflict of interest and double jeopardy as grounds for post-verdict relief. The trial judge, at O.R. 64, *found as a fact* that petitioner's counsel also had represented Alcantar and Lopez under Indictment 77 CR 900.

[3] On May 31, 1978, Alcantar was sentenced to eight (8) years in custody by the same judge that presided over petitioner's trial.

September 8, 1977. On the same afternoon the government offered testimony that Alcantar went to petitioner's home where, according to D.E.A. surveillance, Alcantar gave petitioner a paper bag which bag was supposed to have contained some monies from the earlier drug sale.[4] Additional trial testimony that could be elevated to the "conflict-concept" would include the frequent "source references" during trial. During the government presentation evidence was received as to the alleged "source" of the heroin which was sold on September 8, and September 22, 1977. The "source references" furthered the conflict of interest in that the source under the government's theory of the case was the present petitioner *albeit* the proof tended to indicate that the source was really *Lopez*, trial counsel's third client in this same case (transcript references include Tr. 93-94, 104, 111, 167-169, 171, 213, 220-225). On May 31, 1978, the trial judge granted the petitioner a new trial (O.R. 46). The transcript references both above, and in the later parts of this petition reflect the trial testimony during the second trial, same commencing before a jury on July 10, 1978.

The second guilty verdict against petitioner was returned on July 14, 1978. On September 22, 1978, petitioner was sentenced to eight (8) years in custody with a special parole term of five (5) years to follow. (O.R. 65).

[4] D.E.A. *Agent Schueler* saw the bag go from Alcantar to petitioner as they were walking in the gangway of Medina's home (Tr. 141-144; 154-155). The bag was never recovered *albeit* in addition to *Agent Schueler*, *Agent Peckos* was also watching (Tr. 96-100; 105-106). *Agent Lopez*, some hours earlier, saw Alcantar take the bag with at least some money in it out of the tavern where the heroin sale took place (Tr. 58-60; 64; 67-68; 80-84). Neither the paper bag nor the monies that were supposed to have been in the bag were recovered. (Tr. 140-146).

INTRODUCTION TO ARGUMENT

The petitioner was first tried commencing February 14, 1978. *Lopez*, one co-indictee represented by petitioner's attorney had fled after posting bail (O.R. 64). Another of petitioner's co-indictees, *Alcantar*, pled guilty on February 14 but had not been sentenced during the course of petitioner's first trial. During petitioner's February trial the government offered evidence that on September 8, 1977, Alcantar passed a bag to the petitioner; said bag supposedly containing a monetary proceeds of the heroin sale. Alcantar did not testify. The petitioner *elected* not to testify. THE TRIAL COURT, AS THE GOVERNMENT HAS CONSISTENTLY CONCEDED, MADE ABSOLUTELY NO CONFLICT OF INTEREST INQUIRY AT ANY STAGE OF THE PROCEEDINGS NOW BEFORE THIS COURT.[5] As we shall point out in the body of our argument, the duty to inquire is a responsibility of the trial court and not of trial counsel (compare *A.B.A. Standard, The Function of the Trial Judge, § 3.4(b)* (1974)). At the close of the first trial, during the rebuttal portion of the government's closing argument, government trial counsel referred to petitioner by name . . . something the trial court had repeatedly kept out of the trial.[6] After government counsel's remarks defense counsel sought a side bar conference and the following colloquy is of record:

[5] Rather, both the trial court and the government mistakenly takes solace in *U.S. v. Mandel*, 525 F.2d 671 (C.A. 7, 1975) (cert. denied, 423 U.S. 1049 (1976)); cf., O.R. 64. The record reflects that Alcantar was a potential witness at petitioner's trial (O.R. 25).

[6] The Court of Appeals, even while affirming the conviction, considers the "Herrera" name as one consistent with drug dealing in the Chicago area. (Slp. Op. pg. 7, n.4) (App. A7, *infra*).

MR. GUINAN: Your Honor, may we have a brief side bar?

(The following proceedings were had at the side bar, out of the hearing of the jury:)

MR. GUINAN: Judge, I object and move for a mistrial. That was the most prejudicial argument I have ever heard. The name Herrera was never brought up from an evidentiary standpoint, and any argument by counsel with regard to reference to the name in the indictment and trying to repeatedly go over the name Herrera in the closing argument was to impress the jury that that man's name was Herrera.

MR. COOK: No, absolutely not.

THE COURT: I think, Mr. Cook, that you came close to committing reversible error.

Although I am going to deny the motion, I think you deliberately tried to prejudice the jury by bringing this out. Counsel didn't argue it.

But, I am going to deny the motion at this point, and we can reconsider it at a later time during post-trial motions.

If you can present some cases on it—I don't know—but I am going to deny it at this point.[7]

* * * * *

On May 31, 1978, petitioner was granted a new trial only on the grounds of the government's prejudicial closing argument (O.R. 46).

Petitioner did not seek indictment dismissal, prior to retrial. Neither the trial court nor the Court of Appeals

[7] Tr. 10-11; February 21, 1978. Mr. Guinan is defense counsel and Mr. Cook is the Assistant U.S. Attorney. On February 17, 1978, the trial court had entered judgments of acquittal on three (3) substantive counts (R. 33). Thus, the closing argument and jury deliberation went only to the conspiracy count in the indictment, Count I. Both Alcantar and Lopez were named as co-conspirators in Count I (O.R. 2).

considered "waiver". The trial court denied the post-verdict relief on both double jeopardy and conflict of interest grounds . . . on the merits (O.R. 64). Similarly, the Court of Appeals treated each constitutional question on the merits. The petitioner considers the trial court to have been in error in refusing to vacate his conviction on either of the two (2) constitutional arguments offered. Similarly your petitioner urges that this Court find that the Court of Appeals erred in declining relief.

REASONS FOR GRANTING THE WRIT

1. WHETHER PETITIONER'S SIXTH AMENDMENT [RIGHT TO COUNSEL] RIGHTS WERE VIOLATED WHERE HIS RETAINED COUNSEL ALSO REPRESENTED TWO (2) CO-INDICTEES WITHIN THE SAME FEDERAL CONSPIRACY INDICTMENT AND . . . WHERE THE COURT MADE ABSOLUTELY NO INQUIRY AS TO THE POSSIBILITY OF PREJUDICE?

1A. WHETHER THE SIXTH AMENDMENT RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL WAS VIOLATED BY THE MERE POSSIBILITY, HOWEVER REMOTE, THAT A CONFLICT OF INTEREST MAY EXIST? (CF., *CUYLER V. SULLIVAN*, CERT. GRANTED, ... U.S. ....., ... S.C. ....., 26 CrL 4002 (1979)?

1B. WHETHER THE COURT OF APPEALS ERRED IN APPLYING THE WRONG STANDARD AS RELATING TO SIXTH AMENDMENT CONFLICT OF INTEREST [BURDEN ON DEFENSE COUNSEL TO ASCERTAIN CONFLICT AS OPPOSED TO DUTY UPON THE TRIAL COURT TO MAKE INQUIRY WHERE SAME COUNSEL REPRESENTED THREE (3) CO-INDICTEES UNDER THE SAME CONSPIRACY INDICTMENT]?

1C. DOES *HOLLOWAY V. ARKANSAS*, 435 U.S. 475, 98 S.CT. 1173 (1978), REQUIRE REVERSAL WHERE PREJUDICE IS SHOWN AND THE TRIAL COURT MADE ABSOLUTELY NO INQUIRY ON THE SUBJECT OF CONFLICT OF INTEREST?

1D. WHETHER THE ABOVE QUESTIONS REQUIRE PARTICULARLY CLOSE SCRUTINY WHERE [AS HERE] NEITHER THE PETITIONER NOR THE CO-INDICTEES SPOKE ENGLISH?

1E. WHETHER CERTIORARI IS APPROPRIATE TO REVIEW THE SIXTH AMENDMENT QUESTION IN THIS CASE WHERE THE COURT BELOW MADE ABSOLUTELY NO INQUIRY AS TO "CONFLICT OF INTEREST", PARTICULARLY IN LIGHT OF THE LACK OF UNIFORMITY IN THE CIRCUITS ON THIS QUESTION AND IN LIGHT OF CERTIORARI BEING GRANTED IN *CUYLER V. SULLIVAN*, 26 CRL 4002 (1979)?

Petitioner consolidates each question into a single, but divided, argument.

(A)

HOLLOWAY v. ARKANSAS, 435 U.S. 475

In *Holloway* this Court offered two (2) issues . . . but left them without resolution. In *Holloway* the Court stated:

> "First, appellate courts have differed on how strong a showing of conflict must be made or how certain the reviewing court must be that the asserted conflict existed, before it will conclude that the defendants were deprived of their right to the effective assistance of counsel. . . . Second, courts have differed with respect to the scope and nature of the affirmative duty of the trial judge to assure that criminal defendants are not deprived of their right to the effective assistance of counsel by joint representation of conflicting interests. . . .

We need not resolve these two issues in this case, however." (Cits. omitted) (98 S.Ct. at 1178).

Under the facts of this case we urge certiorari be granted to resolve both unanswered questions [issues] in *Holloway*. Our showing of conflict is substantial. The *Glasser* doctrine does not require the court to indulge in prejudice-calculations. In *Glasser v. U.S.*, 315 U.S. 60 (1942), the Court, stated:

> "The right to have the assistance of counsel is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial", 315 U.S. at 75-76.

In *Holloway* the Court repeated part of the *Glasser* concept as follows:

> "Upon the trial judge rests the duty of seeing that the trial is conducted with solicitude for the essential rights of the accused. . . . The trial court should protect the right of an accused to have the assistance of counsel. (98 S.Ct. at 1179)

Inexplicably the court below shifted the responsibility of conflict *vel non* from the trial judge to the litigant (Slp. Op. pg. 11; App. A11, *infra*). The court below, while affirming the conviction, found that under Seventh Circuit precedent no inquiry by the trial judge, *vis-a-vis*, conflict of interest, either is or was, mandated. Of course, the court was wrong. In *U.S. v. Gougis*, 374 F.2d 758 (C.A. 7, 1967), the Court reversed, in part, a federal drug conviction solely on Sixth Amendment grounds where the trial court made no inquiry on conflict of interest . . . even though a single appointed counsel represented two (2) defendants in that case. In *Gougis* the Court of Appeals not only reversed but, citing *Glasser*, stated the following:

> Moreover, there is no need on the part of a defendant to show that he has been prejudiced by the multiple representation. *Glasser v. United States, supra*, at pages 75-76, 62 S.Ct. 457. (374 F.2d at 761)

In *U.S. v. Gaines*, 529 F.2d 1038 (C.A. 7, 1976), the Court granted *Gaines* a new trial, and reviewed the concept of conflict of interest as follows:

> "There are, however, occasions when an injustice of constitutional magnitude occurs despite what appear at the time to be the best efforts of experienced and competent judicial and prosecutorial personnel. We conclude that *Gaines* cannot be said to have made a knowing waiver of his sixth amendment right to the effective assistance of counsel, *in the absence of a specific warning of the serious danger to his defense posed by his attorney's conflict of interest*" (529 F.2d at 1045).

The Seventh Circuit Rule [according to the instant decision] is:

> According to Medina, the trial court had an affirmative duty to inquire on the record about the hazards of joint representation. This argument is without merit. This Circuit has consistently declined to fashion a per se rule under the Constitution or its supervisory powers creating an affirmative duty in the trial court to inquire into every incident of joint representation to determine whether it involves a conflict of interest. *United States v. Mavrick*, No. 78-2226 (7th Cir. 1979); *United States v. Mandell*, 525 F.2d 671 (7th Cir. 1975), *cert. denied*, 423 U.S. 1049 (1976).[7] We have delineated the trial court's duty in this way:
>
> > [The court must] be alert for indicia of conflict at all stages of the proceeding, including during trial. . . . When the possibility of a conflict appears during trial, the court must investigate the relevant facts, advise the defendant, and determine whether continued representation, absent waiver would violate the sixth amendment.[8]

[8] Slp. Op. 10-11; App. A, *infra*, pp. A10-11. Petitioner, in the Court below, was *Medina*.

Thus, the Court of Appeals declined to either understand their own circuit rule . . . but in any event, the Court of Appeals in this case declined to follow *Holloway*.

(B)

THE CIRCUIT POSITIONS

In *U.S. v. Donahue*, 560 F.2d 1039 (C.A. 1, 1977), that Court reversed a federal drug conviction where both trial defendants were represented by separate members of the same law firm. The Court, while reversing, pointed out that *absent an inquiry by the trial court* reversal is the order based upon nothing more than a conflict of interest; same being in violation of the Sixth Amendment (*id.* at 1042-44).

In *U.S. v. Carrigan*, 543 F.2d 1053 (C.A. 2, 1976) the Court held that a new trial is required where co-defendants represented by the same retained attorney were never advised by the trial court as to a potential conflict of interest and prejudice appeared in that one defendant gave testimony which conflicted with the prior statement of the other defendant. In *Carrigan* both defendants were tried to a jury. One defendant made a pretrial statement to a FBI agent that was contradicted by the testimony of the other co-defendant at trial. The first co-defendant never testified at trial, 543 F.2d at 1055.

The *Carrigan* Court found that the conflict between the pretrial statement of one defendant and the testimony of the other defendant, was sufficient to trigger an inquiry by the trial court as to the dangers of this multiple representation. The *Carrigan* Court held:

> *"The defendant should be fully advised by the trial court of the facts underlying the potential conflict*

> *and be given the opportunity to express his views"*, 543 F.2d at 1055.

In *Sullivan v. Cuyler*, 593 F.2d 512 (C.A. 3, 1979), the Court granted habeas relief to a state inmate following a murder conviction. The Court of Appeals found that the conflict of interest as between retained trial counsel and two (2) separate defendants was sufficient to require a new trial. The *Sullivan* Court quoted this Court's *Holloway* decision with approval (593 F.2d at 520). While reversing the Court stated:

> Our examination of the record convinces us that there is in this case at least a possibility of prejudice or conflict of interest and that independent counsel might well have chosen a different trial strategy. Therefore, prior decisions of this court compel reversal. (593 F.2d at 521).[9]

It is abundantly clear that "dual-representation" carries with it a need for trial judge inquiry in the First, Second and Third Circuits. The Fourth Circuit is none the different. In *U.S. v. Truglio*, 493 F.2d 574 (C.A. 4, 1974), the Court announced the "inquiry" directive in that Circuit. In *Truglio* while reversing a federal drug conviction the Court stated:

> Here the court knew that the plea bargain had been negotiated by one attorney who represented all five of the defendants, and while representation of codefendants by the same attorney is not in itself tantamount to the denial of effective assistance of counsel, "[t]he very fact that two or more co-defendants are represented by the same counsel *should alert a trial judge and cause him to inquire whether the defenses to be presented in any way con-*

[9] *Sullivan v. Cuyler* is now before this Court; *Cuyler v. Sullivan*, ... U.S. ....., 266 CrL 4002 (1979). The Third Circuit inquiry views are considered in *U.S. v. Levy*, 577 F.2d 200 (C.A. 3, 1977).

flict." United States v. Lovano, 420 F.2d 769, 772 (2 Cir. 1970). (493 F.2d at 579).[10]

The Court of Appeals for the Fifth Circuit has continually announced their disapproval of "dual-representation" both with and without inquiry from the Court. In *Stephens v. U.S.*, 595 F.2d 1066 (C.A. 5, 1979), the Court found that dual representation was itself such a conflict of interest that no prejudice need be demonstrated to gain reversal . . . even on § 2255. In *Stephens* a single attorney represented a guilty pleading co-indictee and *Stephens*. The guilty pleading co-indictee eventually testified as a government witness. This, the Court, could not condone and reversal was the result.[11] In *U.S. v. Alvarez*, 580 F.2d 1251 (C.A. 5, 1978), the Court again reversed a federal drug conviction finding that, in combination, *insufficient inquiry* and "dual representation" combined to thwart the Sixth Amendment. A new trial resulted. In both *Stephens* and *Alvarez*, this Court's decision in *Holloway* was cited with approval, e.g., *Alvarez*, 580 F.2d at 1257; *Stephens*, 595 F.2d at 1067. In combination the Fifth Circuit precedents compel both an inquiry and a finding by the trial judge of no conflict of interest (cf., *U.S. v. Garcia*, 517 F.2d 272 (C.A. 5, 1975) (waiver of conflict approved where trial court *inquires* in a fashion akin to Rule 11)).

In the Eighth Circuit a meaningful inquiry is a necessity in "dual representation" cases, *U.S. v. Lawriw*, 568 F.2d 98 (C.A. 8, 1977) (affirming conviction in a

[10] In *Truglio* the Court of Appeals for the Fourth Circuit relied on a Second Circuit decision, *U.S. v. Lavano*, 420 F.2d 769 (C.A. 2, 1970). The need for inquiry in *Lavano* was overlooked by the court below in this case *albeit* THE GOVERNMENT RELIED ON *LAVANO* IN THEIR SEVENTH CIRCUIT BRIEF (Gov. Brf., 7th Cir., page 12-13).

[11] In the case at bar the government had compelled Herrera's guilty pleading co-indictee to be available as a witness (O.R. 25). Even this did not gain petitioner an inquiry from either the Court or the government!!

federal drug case where inquiry was made by trial judge in dual representation case). In *Lawriw* the Court, while approving of a mandatory "inquiry" standard surveyed the several Circuits. The sole Circuit with no necessary conflict seemed to be the Seventh Circuit (568 F.2d at 102).

As may be abundantly clear . . . the fact that petitioner was being tried within the jurisdiction of the Court of Appeals for the Seventh Circuit . . . inescapably led to the affirmation of conviction where:

> (a) A single defense counsel represented three (3) separate co-indictees within the same indictment and before the same trial court; and
>
> (b) No inquiry of any kind was made by the trial judge to ascertain the status of any *conflict of interest*; and
>
> (c) One of the three co-indictees . . . might have testified as either a defense or government witness . . . in which case a pure Sixth Amendment reversal would have resulted; and
>
> (d) Where neither Alcantar nor the petitioner at bar spoke the English language [the government will concede before this Court that in each and every proceeding in this case a Court-appointed interpreter was necessary so that the proceedings could be understood by the defendants].

If *Glasser* means that prejudice is not to be nicely calculated . . . then the petitioner at bar merits both the granting of certiorari and a resultant new trial. The unresolved questions in *Holloway* as to both how strong a showing of conflict and the need for "affirmative inquiry" are both present in the case at bar. Under this Court's supervisory power [28 U.S.C. § 2106] the unresolved *Holloway* issues can be answered.

(C)
CERTIORARI CONSIDERATIONS

Petitioner has attempted to display, with accuracy and fairness, a situation that may be shocking to this Court. This is one of the few cases where a single attorney has represented three (3) co-indictees within the parameters of the same indictment before the same court. No inquiry was made whatsoever by the trial court and this lack of inquiry is fostered by the mistaken view in the Seventh Circuit that the responsibility falls to the attorney, not the court. We view *Holloway* to expressly stand to the contrary. In addition the Court of Appeals attempted to calculate the prejudice to petitioner. *Glasser* precludes that sort of reasoning.

The Seventh Circuit commends the responsibility of "conflict" to the attorney [Slp. Op., p. 11, App. A11, *infra*]. The several Circuits hold expressly to the contrary [the First, Second, Third, Fourth, Fifth and Eighth Circuits properly put the responsibility on the trial court as does the approved A.B.A. Standard]. The instant decision looms as a realistic danger to the administration of criminal justice in criminal courts. The fact that in 1979 Rule 44(c)[12] came into being does not at all reduce the posture of this case. The new rule making uniform the

[12] As of August 1, 1979, Rule 44(c), Fed.R.Crim.Proc., is effective. That Rule, in part, reads:

> (c) *Joint representation.* Whenever two or more defendants have been jointly charged pursuant to Rule 8(b) or have been joined for trial pursuant to Rule 13, and are represented by the same retained or assigned counsel or by retained or assigned counsel who are associated in the practice of law, the court shall promptly inquire with respect to such joint representation and shall personally advise each defendant of his right to the effective assistance of counsel, including separate representation. Unless it appears that there is good cause to believe no conflict of . . .

trial court's responsibility only furthers the need for relief in this case.

The granting of certiorari in *Cuyler v. Sullivan*, 26 CrL 4002 (October, 1979), brings with it a question which is clear in this petition. One of the questions on certiorari is:

> (1) Is Sixth Amendment right to effective assistance of counsel violated by mere possibility, however remote, that conflict of interest may exist?

A similar question is found within the parameters of the petition at bar. Did the mere fact that neither Alcantar nor Lopez [both of the co-indictees represented by the same attorney] testify in petitioner's trial change the "potential" for prejudice? We believe not. Under all the circumstances of this case we respectfully urge that this petition be joined with the pending petition in *Cuyler v. Sullivan*. We urge the grant of certiorari and a reversal of the conviction below.

QUESTION 2

(B)

2. WHETHER THE DOUBLE JEOPARDY CLAUSE OF THE FIFTH AMENDMENT PRECLUDED PETITIONER FROM BEING CONVICTED ON RETRIAL . . . WHERE A NEW TRIAL HAD BEEN GRANTED BASED UPON THE GOVERNMENT'S CLOSING ARGUMENT DURING PETITIONER'S FIRST TRIAL WHERE THE TRIAL JUDGE STATED: "ALTHOUGH I AM GOING TO DENY THE MOTION, I THINK YOU DELIBERATELY TRIED TO PREJUDICE THE JURY BY BRINGING THIS OUT" (AND, POST-TRIAL, THE TRIAL JUDGE GRANTED A NEW TRIAL SOLELY ON THE GROUND OF PROSECUTORIAL MISCONDUCT DURING CLOSING ARGUMENT)?

2a. WHETHER, UNDER SUCH CIRCUMSTANCES, WAS THERE SUCH DELIBERATE PROSECUTORIAL OVERREACHING SO THAT THE DOUBLE JEOPARDY CLAUSE BARRED RETRIAL?

During the rebuttal of the government's closing argument reference was made to the "Herrera" name. Well known to the trial judge was the simple fact that the name "Herrera" was [and is] synonymous with "major heroin trafficking" in the Chicago area. The portion of the rebuttal closing argument has earlier been reproduced (Tr. 295, first trial; Supp. Tr. 10-11). An immediate side bar, requested by defense counsel, provoked the following comments:

> MR. GUINAN: Your Honor, may we have a brief side bar?
>
> (The following proceedings were had at the side bar, out of the hearing of the jury:)
>
> MR. GUINAN: Judge, I object and move for a mistrial. That was the most prejudicial argument I have ever heard. The name Herrera was never brought up from an evidentiary standpoint, and any argument by counsel with regard to reference to the name in the indictment and trying to repeatedly

> go over the name Herrera in the closing argument was to impress the jury that that man's name was Herrera.
>
> MR. COOK: No, absolutely not.
>
> THE COURT: I think, Mr. Cook, that you came close to committing reversible error.
>
> *Although I am going to deny the motion, I think you deliberately tried to prejudice the jury by bringing this out.* Counsel didn't argue it.
>
> But, I am going to deny the motion at this point, and we can reconsider it at a later time during post-trial motions.
>
> If you can present some cases on it—I don't know—but I am going to deny it at this point.

We ask the Court to consider the "totality of the circumstances". During trial the three (3) substantive counts charging the petitioner with distributing heroin on September 8 and 22, 1977, were dismissed (O.R. 33). Thus the only surviving count before the jury was the conspiracy count (Count I of the indictment, reproduced at O.R. 2). The jury returned a guilty verdict but on May 31, 1978, the Court granted petitioner a new trial. The Court's comments [over three (3) months later] included the following:

> With respect to the other question as concerning the prejudicial effect of the argument of counsel, I take a different position. It seems to me that after reading the cases and also the transcript in this case—which I did very carefully—it would be futile to take this case to the appellate court because I just think it would result in a reversal, and therefore I am going to grant a new trial to be held immediately—as quickly as possible—concerning this defendant.[13]

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[13] The above is directly reproduced from the transcript of May 31, 1978. The record below contains the supplemental transcript regarding the occurrences of May 31, 1978. The government DID NOT APPEAL THE TRIAL COURT'S

(Footnote continued on following page)

Petitioner was re-convicted of the conspiracy count on July 14, 1978. Through new counsel petitioner presented, *inter alia*, written constitutional arguments seeking post-verdict relief on both double jeopardy and conflict of interest grounds. The trial court declined post-verdict relief on September 14, 1978 (O.R. 64). The trial court ruled that the double jeopardy clause did not preclude retrial. The trial court found that government trial counsel's conduct was not either grossly negligent or intentional [bad faith] . . . O.R. 64 at 3-4. The substance of our claim is that both the trial court and the court of appeals were in error. We articulate the proper standards.

In *U.S. v. Tateo*, 377 U.S. 463, 84 S.Ct. 1587 (1964) the Court reversed an order dismissing an indictment on double jeopardy grounds. After reviewing certain of the trial facts the majority opinion offered the following guidance:

> ". . . If there were any intimation in a case that *prosecutorial* [or judicial] impropriety justifying a mistrial resulted from a fear that the jury was likely to acquit the accused, *different considerations would, of course, obtain*" (84 S.Ct. at 1590, n.3).

We add, that it is significant that the Court of Appeals while declining to grant relief found no difference as between a "mistrial" and the grant of a new trial, post-verdict, where prosecutorial misconduct and double

[13] *continued*

GRANT OF A NEW TRIAL. The first three (3) paragraphs of the Court's oral comments on May 31, 1978, included the denial of the post-verdict motion for judgment of acquittal based upon the alleged insufficiency of evidence regarding the conspiracy evidence against the petitioner.

It is interesting to note that on the same date the same attorney still representing co-indictee, *Alcantar*, appeared with Alcantar for sentencing. Alcantar, on May 31, 1978, received an eight (8) year prison sentence based on his earlier guilty plea to the same indictment, 77 CR 900.

jeopardy were the subject of review (Slp. Op. pg. 9, n.5; App. A9, *infra*). An appropriate analysis of prosecutorial misconduct which bars retrial is found in *U.S. v. Martin*, 561 F.2d 135 (C.A. 8, 1977). In *Martin* the trial court originally granted a mistrial (on Martin's request) where, during trial, the prosecutor clearly offered offensive and inadmissible testimony. On retrial Martin was convicted. The Court reversed finding that the Double Jeopardy Clause barred retrial. In pertinent part, the *Martin* opinion offers guidance to our position as follows:

> "The Supreme Court has recognized, however, limited circumstances where a defendant's mistrial request does not remove the Double Jeopardy bar. For example, the Double Jeopardy Clause protects a defendant against governmental actions intended to provoke mistrial requests. *United States v. Dinitz, supra*, 424 U.S. at 611, 96 S.Ct. 1075. It bars retrials where the underlying error is "motivated by bad faith or undertaken to harass or prejudice" the defendant. *United States v. Dinitz, supra*, 424 U.S. at 611, 96 S.Ct. at 1082. Thus, where "prosecutorial overreaching" is present, *United States v. Jorn, supra*, 400 U.S. at 485, 91 S.Ct. 547, the interests protected by the Double Jeopardy Clause outweigh society's interest in conducting a second trial ending in acquittal or conviction. [Cits. Omtd.]
>
> Our inquiry, therefore, must center upon the prosecutor's conduct prior to the mistrial in order to determine if there was prosecutorial overreaching. Although mere negligence by the prosecutor is not the type of overreaching contemplated by *Dinitz*, if the prosecutorial error is motivated *by bad faith or undertaken to harass or prejudice the defendant*, then prosecutorial overreaching will be found. [Cits. Omtd.]" (561 F.2d at 139).

This Court, in a later decision, analyzed the double jeopardy clause and government misconduct. In *Arizona v. Washington*, 434 U.S. 497, 98 S.Ct. 824 (1978), the Court held that the double jeopardy clause did not bar retrial after a mistrial was declared based upon misconduct by defense counsel. The decision includes:

> "As this Court noted in *United States v. Dinitz*, 424 U.S. 600, 611, 96 S.Ct. 1975, 1081, 47 L.Ed. 2d 267:
>
> > "The Double Jeopardy Clause does protect a defendant against governmental actions intended to provoke mistrial requests and thereby to subject defendants to the substantial burdens imposed by multiple prosecutions. *It bars retrials where "bad-faith conduct by judge or prosecutor'* . . . threatens the '[h]arassment of an accused by successive prosecutions or declaration of a mistrial so as to afford the prosecution a more favorable opportunity to convict' the defendant."
>
> Thus, the strictest scrutiny is appropriate when the basis for the mistrial is the unavailability of critical prosecution evidence, or when there is reason to believe that the prosecutor is using the superior resources of the State to harass or to *achieve a tactical advantage over the accused.*" (98 S.Ct. at 831-32; ft.nts. omitted; emphasis ours)

In *U.S. v. Kessler*, 530 F.2d 1246 (C.A. 5, 1976), the Court dismissed the government's appeal after a finding by the trial judge that prosecutorial misconduct barred retrial. The *Kessler* analysis was adopted by the Court of Appeals for the Fifth Circuit in a later case, as follows:

> "Thus, a stringent analysis of the prosecutor's conduct, considering the totality of the circumstances prior to the mistrial, to determine if there was "prosecutorial overreaching" is our inquiry. *If "prosecutorial overreaching" is found, a second trial is barred by the Double Jeopardy Clause notwithstanding the fact that the defendants requested the mistrial.*
>
> To find "prosecutorial overreaching", the government must have, through "*gross negligence* or *intentional misconduct*", caused aggravated circumstances to develop which "seriously prejudice[d] a defendant" causing him to "reasonably conclude that a continuation of the tainted proceeding would result in a conviction" [cits. omtd.]" (566 F.2d at 1317).[14]

Additional insight into the lack of security in this phase of double jeopardy law is found in *U.S. v. Leonard*, 593 F.2d 951 (C.A. 10, 1979). In *Leonard* the Court reviewed a case where a pretrial motion to dismiss on double jeopardy grounds was denied in the trial court. The question raised was the bad faith *vel non* of government counsel. In *Leonard*, the Court analyzed the proposition of law as follows:

> "*The Supreme Court does not appear to have considered the question which is before us*, but from what has been handed down it is to be gleaned that the conduct of the United States Attorney, which is necessary to bar a retrial, must have been purposeful or intentional or must have been reckless conduct which rises to the level of purposefulness and must have sought to provoke a mistrial motion from defendants.

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[14] As reproduced in *U.S. v. Crouch*, 566 F.2d 1311 at 1317 (C.A. 5, 1978). In *Crouch* the Court affirmed the denial of pretrial double jeopardy relief where the sole issue related to a mistrial prompted by government misconduct. In *Crouch* Circuit Judge Goldberg offered a strong dissenting opinion using this Court's decision in *U.S. v. Dinitz*, 424 U.S. 600 (1976), as the touchstone for his analysis. Judge Goldberg would have found that the government conduct which prompted the mistrial declaration was of sufficient magnitude so that the double jeopardy clause barred retrial (566 F.2d at 1321-22).

> The Supreme Court has ruled that retrial *is barred* where the conduct was undertaken to harass or *prejudice* the defendant (and cause a mistrial at defendants' behest). *Lee v. United States*, 432 U.S. 23, 97 S.Ct. 2141, 53 L.Ed.2d 80 (1977), and *United States v. Dinitz*, 424 U.S. 600, 96 S.Ct. 1075, 47 L.Ed.2d 267 (1976). It is to be inferred from the authorities, in addition, that retrial is likely to be barred where the prosecutor's conduct has resulted in a belief by him that acquittal is likely in any event. *United States v. Jorn*, 400 U.S. 470, 91 S.Ct. 547, 27 L.Ed.2d 543 (1971). See also *United States v. Tateo*, 377 U.S. 463, 84 S.Ct. 1587, 12 L.Ed.2d 448 (1964)".[15]

Our inquiry is thus reduced to a realistically simple proposition. Is THE DOUBLE JEOPARDY CLAUSE so frail that it may not be invoked to preclude retrial where . . . deliberate government conduct invaded the original trial [and jury]? In this case we have the trial judge, immediately following the prosecutor's comments, reflecting on deliberate prejudice. Then, some three (3) months later, the same trial judge grants a new trial based only on government counsel's comments during the rebuttal-closing argument. Under these circumstances does not the double jeopardy clause bar retrial? We urge that this Court consider the analysis in *Arizona v. Washington*:

> "As this Court noted in *United States v. Dinitz*, 424 U.S. 600, 611, 96 S.Ct. 1975, 1081, 47 L.Ed.2d 267:
>
> > "The Double Jeopardy Clause does protect a defendant against governmental actions intended to provoke mistrial requests and thereby to

[15] In *Leonard* at 954, the Court reviews whether or not "bad faith" was involved insofar as government counsel was concerned. Compare the companion case *U.S. v. Bowline*, 593 F.2d 944 (C.A. 10, 1979) (Holloway, Cir. J., dissenting from the denial of double jeopardy relief.)

> subject defendants to the substantial burdens imposed by multiple prosecutions. *It bars retrials where "bad-faith conduct by judge or prosecutor* '. . . threatens the '[h]arassment of an accused by successive prosecutions or declaration of a mistrial so as to afford the prosecution a more favorable opportunity to convict' the defendant."

Thus, the strictest scrutiny is appropriate when the basis for the mistrial is the unavailability of critical prosecution evidence, or when there is reason to believe that the prosecutor is using the superior resources of the State to harass or to *achieve a tactical advantage over the accused.*" (98 S.Ct. at 831-32; ft.nts. omitted; emphasis ours)

CONCLUSION

In light of the exceptional importance of the questions presented it is respectfully urged that this petition for certiorari be granted. Consolidated Question 1 falls, in part, within the earlier granting of certiorari by the Court in *Cuyler v. Sullivan*, ... U.S. ....., ... S.Ct. ....., 26 CrL 4002 (October, 1979). As to the double jeopardy question herein presented the Court of Appeals for the 10th Circuit in *U.S. v. Leonard*, 593 F.2d 951 (C.A. 10, 1979), found that this Court has not directly passed on the particular question of what degree of government misconduct precludes retrial under the DOUBLE JEOPARDY CLAUSE. It is urged that the instant petition provides an appropriate vehicle for the resolution of the double jeopardy clause versus prosecutorial misconduct.

Respectfully submitted,

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APPENDICES

In the

United States Court of Appeals

For the Seventh Circuit

No. 78-2245

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

RODOLFO MEDINA-HERRERA,

Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 77 CR 900-1—**Stanley J. Roszkowski**, *Judge.*

ARGUED JUNE 12, 1979—DECIDED OCTOBER 1, 1979

Before PELL, SPRECHER, and WOOD, *Circuit Judges.*

PELL, *Circuit Judge.* The defendant, Rodolfo Medina-Herrera, appeals from his conviction for conspiring to distribute heroin in violation of 21 U.S.C. § 846. On appeal the defendant raises issues on evidentiary rulings. He also argues that his retrial after a finding of prosecutorial error violated the double jeopardy clause. He finally argues that his attorney had a conflict of interest, depriving him of due process and his right to effective assistance of counsel.

The evidence at trial showed that the defendant conspired with Candelario Alcantar, Jose and Jorge Vasquez, and Jose Lopez to distribute over twelve pounds of heroin to Richard Sanchez, an agent of the

Drug Enforcement Administration (DEA), and Angelo Rodriguez, a Government informant. On September 8, 1977, Rodriguez and Sanchez, carrying $13,000 in a yellow Montgomery Ward bag, met Jose and Jorge Vasquez at a tavern where a sale of heroin was arranged. Alcantar, Vasquez and the informant Rodriguez drove to 2832 S. Trumbull in Chicago, the residence of the conspirator Lopez, where Alcantar removed a brown bag of heroin from the trunk of a white Ford. They returned to the tavern, and the sale was completed. Alcantar left the bar with the Montgomery Ward bag after giving some of the money to Jose Vasquez. Alcantar drove to 2831 S. Homan, the defendant's residence, where the defendant was waiting in the front yard. Alcantar handed the Montogomery Ward bag to the defendant, and they both walked inside the house.

On September 22, 1977, two drug sales took place in a similar fashion. At 10:15 a.m. on that date, Government agents observed the defendant leaving the Lopez residence on Trumbull. He put a small brown paper bag in the trunk of his car and drove away. About 12:20 p.m., Lopez went to the defendant's residence on Homan. Alcantar was seen there a few minutes later. At 1:40 p.m., the defendant and Lopez came out of the defendant's house. Alcantar and Lopez returned to the Lopez house on Trumbull.

In the meantime agent Sanchez and the informant Rodriguez negotiated another purchase. At 11:45 a.m., Sanchez and Rodriguez went to the same tavern to which they had gone for the September 8 sale. Rodriguez met with Jose Vasquez. At 12:30 p.m., Rodriguez and Sanchez went to a parking lot across from the tavern. Jose and Jorge Vasquez soon arrived. Jose made a call from a pay phone, and then explained that his source of supply required the money in advance. Sanchez rejected these terms, and Jose promised to return later. They met again in the same parking lot at about 1:15 p.m. Jose made another call from the pay phone. He then handed Sanchez and Rodriguez a small sample of heroin. Sanchez then showed Jose the $26,000 they were carrying in a red, white, and black bag.

The agent and the informant followed Jose and Jorge in their car to the corner of 30th and Homan. After they arrived, Jorge Vasquez headed up 30th Street and then north on Trumbull where he met and talked with Alcantar and Lopez. Alcantar and Vasquez then walked back to 30th and Trumbull, where Rodriguez and Sanchez were waiting. Alcantar negotiated briefly with Sanchez, then walked back to see Lopez on Trumbull. The two returned to Lopez' house. Alcantar then emerged from Lopez' house, carrying a brown paper bag. Alcantar and Lopez got into a white Ford and drove toward 30th and Trumbull where the agent and informant were still waiting. Sanchez and Rodriguez were instructed to follow Alcantar in their car to the corner of 28th and Homan. They stopped about 100 feet south of the intersection. There, Alcantar delivered about a kilogram of heroin, and Jose Vasquez received the $26,000 in the red, white, and black bag. Sanchez and Rodriguez then left. It was approximately 2:00 p.m.

At 3:30 p.m. Rodriguez placed a call to the same tavern and started the second sale of September 22. The agent and the informant left the DEA office with $117,000. At 3:45 p.m., the defendant left his house by car, and arrived shortly after at the Lopez house. At the same time, Alcantar arrived on foot. Both Alcantar and the defendant entered the Lopez residence. At 4:00 the defendant left and returned home. About the same time, Sanchez and Rodriguez arrived near the corner of 28th and Homan and parked their car. A few minutes later, both Jose and Jorge Vasquez were seen at the Lopez residence. Alcantar met Jose and the two went inside. Jorge drove to where the agent and the informant were parked, spoke to them, and returned to Lopez' house. He spoke briefly to Jose and then drove back to tell the agent and informant to get their money ready. At 4:25 Jorge returned to the Lopez residence and Jose emerged carrying a white plastic bag. He gave the bag to Jorge. Jorge then returned to 28th and Homan and passed about four kilograms of heroin through the car window to Sanchez and Rodriguez. Jorge was immediately arrested. A Government agent simultaneously entered the Lopez residence and arrested Jose Vasquez, Lopez,

and Alcantar. The defendant was arrested at his residence. The second floor windows there had a view of the street and were open.

Medina, Lopez, Alcantar, and the Vasquez brothers were charged in the same indictment. One count charged all of them with conspiracy to deliver heroin in September 1977. The defendant was also charged in three separate counts with the substantive offense of delivering heroin. The defendant was tried alone on these four charges in February 1978. At this trial, the judge granted the defendant's motion to acquit on the three substantive counts, but sent the conspiracy charge to the jury. The defendant was found guilty on this charge. The trial court, however, granted a new trial on the defendant's motion because of prosecutorial error during final arguments.

The defendant was retried in July before the same judge on the conspiracy charge only. The jury returned a guilty verdict.

We turn first to the defendant's arguments relating to the proof of his involvement in the conspiracy. The defendant urges first that the trial judge erred in not making an express finding, preliminary to admitting co-conspirator hearsay, that the conspiracy and the defendant's membership in the conspiracy was proved by a preponderance of the evidence. This requirement was established by our decision in *United States v. Santiago*, 582 F.2d 1128 (7th Cir. 1978). It is well-settled, however, that in a trial that occurred, like this one, prior to our *Santiago* decision, failure to adhere to *Santiago* procedures is not reversible error. *E.g., United States v. Dalzotto*, Nos. 78-2210, 78-2211, Slip Op. at 3 n.1 (7th Cir. 1979); *United States v. Allen*, 596 F.2d 227, 230 (7th Cir. 1979); *United States v. McPartlin*, 595 F.2d 1321, 1357 (7th Cir. 1979). It is sufficient here that the trial judge, who was already familiar with the Government's evidence, having presided over the defendant's previous trial, expressed his awareness of the need for a preliminary showing of the defendant's involvement and his intention to exclude the evidence if the Government

failed to satisfy its burden.[1] *See United States v. Allen*, *supra*, 596 F.2d at 230; *United States v. McPartlin*, *supra*, 595 F.2d at 1358.

The defendant's next objection concerns the survival of the so-called "slight evidence" rule after the *Santiago* decision. At trial, the Government sought admission into evidence of videotapes of the defendant's actions on September 22, 1977, by investigating agents. The trial court admitted the videotapes. The defendant apparently argues on appeal that the *Santiago* preponderance standard precludes admission of the videotapes when the other evidence is only "slight."[2]

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[1] The court told the jury when admitting the testimony:

> Before you answer that question I would like to instruct the ladies and gentlemen of the jury that I am going to allow this testimony at this point—I am making certain—an objection has been made to this testimony. I overruled the objection subject to the government tying up these conversations with the defendant. At this time there is no evidence of that, and unless the government does tie it up we will strike the evidence and I would so instruct you. But I am going to allow the evidence for that purpose at this time, with the understanding that the government will tie it up later. If they do not I will then strike the evidence in that event.

[2] We have had some difficulty understanding the defendant's argument as to the tapes from his brief before this court. We have therefore turned to the trial transcript where trial counsel objected to admission of the tapes, apparently on the same grounds:

> [Defense]: Well, Judge, if you are going to deny my motion then I would request, since—as I say, I can't say any more positively—I don't think there is any evidence whatsoever showing a conspiracy.
>
> But would you then instruct the jury once again that until they firmly believe that the Government shows by good evidence his involvement in the conspiracy, that they can't take this stuff into their consideration?
>
> * * *
>
> [Prosecution]: That only goes to—it doesn't go to his actions. . . . I have no problem with you instructing the jury about that when they go out but at this point right now we are not talking about any conversations, so I don't think an instruction about this conversation at this time is relevant.

Although we have difficulty seeing any inconsistency between *Santiago* and the "slight evidence" rule,[3] we do not follow at all the defendant's argument that *Santiago* is applicable to the admission of the videotapes. Quite simply, the videotapes do not involve co-conspirator hearsay. To the contrary, they are a record of the defendant's *own conduct* tying him to the conspiracy. The proper foundation for the admission of these tapes was made through the testimony of the agents who witnessed the defendant's actions and made the tapes.

We add that the defendant has alluded to no specific co-conspirator hearsay admitted at trial as having been prejudicial. In fact, the most harmful evidence against the defendant in this case has been the close coordination between his own actions and those of his co-conspirators, and not anything his co-conspirators said about him.

We also find no merit in Medina's argument that his second trial was held in violation of the double jeopardy clause of the Fifth Amendment. Prior to the commencement of the first trial, the defendant moved to strike the Herrera name from the indictment and the pleadings. This motion was unsuccessful. After one venireman testified at voir dire that he thought he had

[3] The slight evidence rule is no more a substitute for the preponderance standard used for admission of co-conspirator hearsay than it is for the reasonable doubt standard used for the ultimate determination of guilt. It merely describes the type of evidence that may suffice to prove involvement in a conspiracy under these standards:

> Once there is satisfactory proof that a conspiracy has been formed, the question of a particular defendant's connection with it may be merely a matter of whether the stick fits so naturally into position in the fagot as to convince that it is a part of it. It is therefore possible for the circumstances of an individual defendant's participation in an established conspiracy to become substantial from their weight in position and context, though in abstraction they may be only slight.

Phelps v. United States, 160 F.2d 858, 867-68 (8th Cir. 1947), *cert. denied*, 334 U.S. 860 (1948) (quoted in *United States v. Harris*, 542 F.2d 1283, 1305 (7th Cir. 1976), *cert. denied*, 430 U.S. 934 (1977)).

seen the defendant's name in the paper, however, the court, with the consent of counsel, told the jury panel that the defendant's name had not appeared in the papers and that his name should not influence their determination of the case, because it is a common name in Spanish-speaking countries.[4]

During the trial, Angelo Rodriguez, the government informant, testified that the Vasquezes had replied in the affirmative to his question whether they were "dealing with some of the Herreras' dope." Furthermore, a Government agent testified that the initials R.H.M. appeared on the garbage cans behind 2831 S. Homan. Medina's theory of defense at trial was to attack any showing of a connection between Medina and the other conspirators. In rebuttal, the Government portrayed Medina as the head of the heroin trafficking operation. During the rebuttal portion of its final argument, the Government argued:

> Here he is touted as being Mr. Rodolfo Medina.
>
> Remember that trash can. You mark the trash cans . . . so that your neighbors can get it back to you . . . if the garbage collectors misplace them. What do the initials on the trash can say? R.H.M. Rodolfo Herrera-Medina. In his neighborhood it had significance for him. So, he could use it when he wants to.

It would appear that this statement could be justified by the evidence; it connected the defendant to the name Herrera, identified by the Vasquezes as their source. Medina moved for a mistrial, however, and although the trial court denied the motion at that time, it did say that

[4] In connection with this issue, the defendant's brief suggests that this court judicially note "that in the last twenty-four (24) or more months the news media in Chicago have frequently referred to the 'Herrera Family' within the context of narcotic [sic] trafficking." The suggestion fails to give us any specific data as to the frequency or volume of media reference. Without acceding, therefore, to the defendant's suggestion, we will nevertheless assume for the purposes of this appeal that the name Herrera may have been the subject of some media attention in connection with drug trafficking.

it would reconsider the issue at post-trial motions. The court reprimanded Government counsel:

> I think, Mr. Cook, that you came close to committing reversible error.
>
> Although I am going to deny the motion, I think you deliberately tried to prejudice the jury by bringing this out. Counsel didn't argue it.
>
> But, I am going to deny the motion at this point, and we can reconsider it at a later time during post-trial motions.

The court later granted the defendant's motion for a new trial based on these statements.

Medina argues that the conviction in the second trial must be reversed because the trial took place in violation of his right against double jeopardy. In granting the defendant's motion for a new trial, the trial court found that the prejudicial effect of the prosecutor's statement would make it "futile to take this case to the appellate court because I just think it would result in a reversal, and therefore I am going to grant a new trial to be held immediately." Assuming that the trial court correctly determined that the error was prejudicial, the test to be applied in determining the propriety of another trial was enunciated by this court in *United States v. Marrero*, 516 F.2d 12 (7th Cir. 1975), *cert. denied*, 423 U.S. 862:

> Our impression then, is that the test to be applied in cases wherein prosecutorial misconduct is alleged is simply whether the accused was assured and accorded the genuine fairness to which he was entitled during the progress of trial. Such an evaluation, as we stated in [*Christman v. Hanrahan*, 500 F.2d 65 (7th Cir. 1974)] at 68, "requires an appraisal of the fairness of the complete trial." In the context of the instant appeal, we interpret this to mean that we must scrutinize the entire trial process—that is, the fairness or lack thereof in not one, but the two trials in which appellant was involved. If appellant was accorded a trial which was eminently fair and free from the taint of prosecutorial misconduct, then, as we interpret the applicable law, the test of fairness has been satisfied. . . .

516 F.2d at 14-15. Thus, it is the general rule that a new trial untainted by the error is sufficient remedy for the error. *See United States v. Tateo*, 377 U.S. 463, 465 (1964).

The defendant has not argued that his second trial was in any way tainted by the improper argument during the first. Rather, he argues that the prosecutor's conduct was "overreaching" and that a new trial was therefore banned under *United States v. Dinitz*, 424 U.S. 600 (1976).[5] In arguing that the prosecutor engaged in intentional misconduct, the defendant relies chiefly on the comments of the trial court at the time of the prosecutor's error. Significantly, however, the trial court found after the second trial:

> While this court found [government's] closing argument in defendant's [first] trial sufficiently prejudicial to warrant a mistrial, we do not find government counsel's conduct to be either grossly negligent or intentional. We therefore hold the defendant's subsequent re-trial was not barred by the Fifth Amendment's Double Jeopardy Clause.

The trial court's original remarks were made spontaneously and without giving the Government an opportunity to reply to the defendant's mistrial motion. Other than this statement by the trial court Medina has

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[5] Although the case before us involves a defense motion for a new trial rather than a defense motion for a mistrial which was the subject of *Dinitz*, we see no reason for differentiation between these situations. The Government admits that the ruling in this case was essentially a reserved ruling on the mistrial motion. Furthermore,

> a defendant is no less wronged by a jury finding of guilt after an unfair trial, than by a failure to get a jury verdict at all; the distinction between the two kinds of wrongs affords no sensible basis for differentiation with regard to retrial.

Tateo, supra, 377 U.S. at 467.

only the statement of the prosecutor itself to support his claim of overreaching. This statement was an isolated incident and was at least arguably based on evidence at trial. We therefore decline to reverse the trial court's ruling on the issue of aggravating circumstances. We cannot in fairness say that the prosecutor lost sight of his fundamental duty to see that justice is done,[6] nor could we even say that this statement alone shows an intentional effort to provoke a mistrial request. The defendant's double jeopardy claim must therefore fail.

Finally, Medina has argued that his rights to due process and effective assistance of counsel were violated by his attorney's representation of two of Medina's co-indictees. According to Medina, the trial court had an affirmative duty to inquire on the record about the hazards of joint representation. This argument is without merit. This Circuit has consistently declined to fashion a per se rule under the Constitution or its supervisory powers creating an affirmative duty in the trial court to inquire into every incident of joint representation to determine whether it involves a conflict of interest. *United States v. Mavrick*, No. 78-2226 (7th Cir. 1979); *United States v. Mandell*, 525 F.2d 671 (7th Cir. 1975), *cert. denied*, 423 U.S. 1049 (1976).[7] We have delineated the trial court's duty in this way:

> [The court must] be alert for indicia of conflict at all stages of the proceeding, including during trial. . . . When the possibility of a conflict appears during trial, the court must investigate the relevant facts, advise the defendant, and determine whether

---

[6] Medina has argued that a showing of "gross negligence" constitutes overreaching sufficient to invoke the bar of double jeopardy, citing *United States v. Crouch*, 566 F.2d 1311 (5th Cir. 1978). Neither the Supreme Court nor this Circuit has so held, and we expressly decline to decide this issue until it is squarely presented by the facts.

[7] This duty of inquiry has changed as of August 1, 1979, for federal prosecutions under the recently approved amendment to Fed. R. Crim. P. 44. *See United States v. Mavrick*, *supra*, slip op. at 13 n.9.

> continued representation, absent waiver would violate the sixth amendment.

United States v. Gaines, 529 F.2d 1038, 1043 (7th Cir. 1976) (citations omitted).

The defendant's argument fails because it does not distinguish between mere joint representation and the possibility or indicia of an actual conflict. One of the co-indictees, Lopez, posted bond, disappeared, and has remained a fugitive from justice. The defendant has alleged no actual conflict as to the representation of Lopez. The other co-indictee, Alcantar, entered a plea of guilty on the day that Medina's first trial began and was sentenced prior to Medina's second trial. As to the representation of Alcantar, the defendant argues:

> [T]he allegation of passing a bag from Alcantar to Medina on September 8, 1977, could only have been disputed by Alcantar and/or Medina. Medina elected not to testify and Alcantar was the only other witness.

The mere fact that Alcantar might have testified in the defendant's trial does not indicate an actual conflict. By the time of the second trial, which is under review here, Alcantar not only had pleaded guilty, but also had been sentenced. Medina's allegations show no connection between the attorney's continuing duty to Alcantar after sentencing and Alcantar's failure to testify in Medina's trial. Medina has shown us nothing in the record before the district court to indicate that Alcantar's testimony would have been helpful in any way. Most important, however, is that the defense counsel, to whom we have entrusted the primary responsibility in this area, *see Mandell*, *supra*, 525 F.2d at 677, never alerted the district court in any way to possible problems with joint representation. Accordingly, we hold that the district court had no affirmative duty of inquiry.

For the above reasons, the judgment of conviction is affirmed.

A true Copy:
Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

APPENDIX B

In the

United States Court of Appeals

For the Seventh Circuit

October 26, 1979.

Before

Hon. WILBUR F. PELL, JR., *Circuit Judge*
Hon. ROBERT A. SPRECHER, *Circuit Judge*
Hon. HARLINGTON WOOD, JR., *Circuit Judge*

No. 78-2245

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

RODOLFO MEDINA-HERRERA,

Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 77 CR 900-1—**Stanley J. Roszkowski**, *Judge.*

On consideration of the petition for rehearing and suggestion for rehearing *en banc* filed in the above-

entitled cause by Rodolfo Medina-Herrera, defendant-appellant, no judge in active service has requested a vote thereon, and all of the judges on the original panel have voted to deny a rehearing. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

No. 79-795

In the Supreme Court of the United States

OCTOBER TERM, 1979

RODOLFO MEDINA-HERRERA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A12) is reported at 606 F.2d 770.

JURISDICTION

The judgment of the court of appeals was entered on October 1, 1979. A timely petition for rehearing was denied on October 26, 1979 (Pet. App. A13-A14).

The petition for a writ of certiorari was filed on November 21, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether petitioner's Sixth Amendment right to the effective assistance of counsel was violated because one retained attorney represented petitioner and two of his co-defendants.

2. Whether the Double Jeopardy Clause was violated by the retrial of petitioner after the court granted petitioner's motion for a new trial because of error in the prosecutor's closing argument.

STATEMENT

After a jury trial in the United States District Court for the Northern District of Illinois, petitioner was convicted of conspiring to distribute heroin, in violation of 21 U.S.C. 846. He was sentenced to eight years' imprisonment, to be followed by a five-year term of special parole (Pet. 7). The court of appeals affirmed (Pet. App. A1-A12).

The evidence at trial showed that on September 8, 1977, a DEA undercover agent and a government informant arranged to make a purchase of a large amount of heroin in a tavern in Chicago. Petitioner's co-defendant, Candelario Alcantar, then drove with the informant and another co-conspirator to the residence of co-defendant Jose Lopez in Chicago. Alcantar obtained a bag of heroin there, and the three returned to the tavern where the sale was completed.

Alcantar then left the tavern with the $13,000 that had been used to purchase the heroin and drove to petitioner's house, where petitioner was waiting in the front yard. Alcantar handed petitioner the bag containing the money, and they then walked into the house (Pet. App. A1-A2).

Two weeks later, two more drug sales took place in a similar fashion. On the morning of September 22, government agents saw petitioner leave Lopez's house, put a brown paper bag in the trunk of his car, and drive away. About two hours later, Alcantar and Lopez were observed at petitioner's house. During the time that Alcantar and Lopez were there, one of petitioner's co-conspirators, after meeting with the agent and informant at the same tavern where they had previously met, made several telephone calls to arrange another heroin transaction with his source of supply. The co-conspirator gave the agent and informant a sample of heroin, and they showed him $26,000 in a bag they were carrying. The agent and the informant followed two of petitioner's co-conspirators from the tavern to a location near petitioner's house. One of the co-conspirators met Alcantar and Lopez nearby. After brief negotiations, Alcantar and Lopez went to Lopez's house, which was also nearby, and Alcantar was soon seen emerging from the house carrying a brown paper bag. Alcantar and Lopez returned to the place where the agent and informant were waiting. The agent and the informant paid the co-conspirators $26,000 for a kilogram of heroin (Pet. App. A2-A3).

Later that afternoon, another sale was arranged. Petitioner and Alcantar traveled once again to Lopez's house. Petitioner returned to his house after about 15 minutes. After negotiating with the agent and the informant, who were parked nearby, one of the co-conspirators went to Lopez's house and emerged carrying a bag. Four kilograms of heroin were then passed to the agent and informant through the window of their car parked a short distance away. All the co-conspirators were arrested, including petitioner (Pet. App. A3-A4).

Petitioner and the other co-conspirators were charged in the same indictment. Petitioner was tried alone, however, and was convicted of conspiracy to distribute heroin. After trial, petitioner filed a motion for a new trial, based on a claim of prosecutorial error during closing argument. The district court granted the motion and set the case for retrial. At the second trial, petitioner was again convicted of conspiring to distribute heroin (Pet. App. A4).

ARGUMENT

1. Petitioner first contends (Pet. 10-19) that he was denied the effective assistance of counsel because his trial counsel had represented his co-defendants Alcantar and Lopez. Alcantar had pleaded guilty on the first day of petitioner's first trial and was sentenced prior to petitioner's second trial (Pet. App. A11); Lopez fled prior to trial and is still a fugitive (*ibid.*).

Petitioner argues that the trial court should have inquired about the joint representation and should have obtained a waiver from him before permitting him to go to trial represented by an attorney who had represented two of his co-defendants at previous stages in the case. While we agree that such inquiries are highly desirable,[1] the failure to conduct them does not result in automatic reversal. Rather, we submit that reversal is required only if the defendant can show that the joint representation produced a conflict of interest of a kind that may well have resulted in some prejudice to his defense.

This Court stated in *Holloway* v. *Arkansas*, 435 U.S. 475, 482 (1978), that joint representation does not result in a per se violation of the Sixth Amendment. Indeed, the Court noted that in some circumstances joint representation may work to the defendant's advantage. *Id.* at 482-483; *Glasser* v. *United States*, 315 U.S. 60, 92 (1942) (Frankfurter, J., concurring). Accordingly, the Court declined to prohibit joint representation generally, and instead indicated that joint representation would lead to reversal of a conviction only if, absent waiver (see 435 U.S. at 483 n.5), there is some showing that the joint representation resulted in a conflict of interest for the attorney. 435 U.S. at 481-483, 487. See *United States* v. *Carrigan*, 543 F.2d 1053, 1055 (2d Cir. 1976); *United States* v. *Mandell*, 525 F.2d 671, 677 (7th Cir. 1975), cert.

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[1] Indeed, they would be required as a matter of course under proposed Rule 44(c), Fed. R. Crim. P.

denied, 423 U.S. 1049 (1976); *United States* v. *Truglio*, 493 F.2d 574, 580 (4th Cir. 1974); *United States* v. *Foster*, 469 F.2d 1, 4 (1st Cir. 1972).[2] On the particular facts presented, however, the Court in *Holloway* did not require a showing of prejudice to the defendants as a result of the joint representation of what the Court found (435 U.S. at 489-491) to be their conflicting interests. Counsel in *Holloway*, on behalf of all co-defendants, had filed a timely objection to the joint representation, and the Court held that prejudice should be presumed to have resulted under such circumstances (*ibid.*), at least absent a determination by the trial court after careful consideration of the objection that no conflict of interest existed.

In *Holloway*, the Court observed that there is some disagreement among the circuits over how strong a showing of conflict of interest must be made, or how certain a reviewing court must be that the asserted conflict existed, before it will conclude that a defendant was deprived of his right to the effective assistance of counsel. 435 U.S. at 483. But whatever the proper standard, it is clear that some showing of a conflict of interest is necessary.

In this case, the court of appeals correctly held that petitioner had failed to show there was any conflict

[2] *Stephens* v. *United States*, 595 F.2d 1066 (5th Cir. 1979), and *United States* v. *Alvarez*, 580 F.2d 1251 (5th Cir. 1978), on which petitioner relies (Pet. 16), likewise involved situations in which the court found that the lawyer was laboring under a conflict of interest—in those cases, because the lawyer was representing prosecution witnesses and the defendant.

of interest created by his attorney's representation of Alcantar, Lopez, and petitioner. Petitioner was tried alone, and the co-defendants represented by his counsel were not tried. By the time of his second trial—the one under review here—Lopez had long since disappeared. Although petitioner suggests (Pet. 19) that some conflict of interest or prejudice resulted from Lopez's failure to testify, under the circumstances of Lopez's flight this can hardly be a ground for reversal, at least without some showing, absent here, that counsel knew of Lopez's whereabouts.

Petitioner contends (Pet. 17, 19) that a conflict of interest is demonstrated by his attorney's failure to call Alcantar to testify, because petitioner might have been able to shift the blame to Alcantar (see Pet. 6-7). But petitioner offers nothing more than speculation on this point. Moreover, Alcantar had already pleaded guilty and been sentenced by the time of the second trial. This surely suggests that counsel's failure to call Alcantar was not attributable to a fear of implicating him in the conspiracy. As the court of appeals stated (Pet. App. A11), "[t]he mere fact that Alcantar might have testified in [petitioner's] trial does not indicate an actual conflict. * * * [Petitioner's] allegations show no connection between the attorney's continuing duty to Alcantar after sentencing and Alcantar's failure to testify in [petitioner's] trial. [Petitioner] has shown us nothing in the record before the district court to indicate that Alcantar's testimony would have been helpful in any way."

Thus, to find a conflict of interest here would be, in effect, to announce a per se rule that, absent waiver, reversal is required whenever a lawyer who jointly represents co-defendants does not call one of them to testify.

Earlier this Term, the Court granted certiorari in *Cuyler* v. *Sullivan*, No. 78-1832 (Oct. 1, 1979), a case that raises the question of the nature of a showing of a conflict of interest that must be made for a conviction to be set aside under the Sixth Amendment. In *Cuyler* the court of appeals held that a defendant who has not previously waived his right to separate representation is entitled to relief if he can show that the joint representation in his case resulted in " 'a possible conflict of interest or prejudice, however remote.' " *United States ex rel. Sullivan* v. *Cuyler*, 593 F.2d 512, 519 (3d Cir. 1979), quoting *Walker* v. *United States*, 422 F.2d 374, 375 (3d Cir.), cert. denied, 399 U.S. 915 (1970).[3]

The possibility of a conflict in this case is remote (see pages 6-7, *supra*); the court of appeals upheld petitioner's conviction because he had shown no "actual

[3] The Third Circuit's decision in *United States ex rel. Sullivan* v. *Cuyler* does not adequately distinguish between a possibility of a conflict of interest and the possibility of prejudice resulting from a conflict of interest. A possibility of a conflict, "however remote," could be articulated in almost every case of joint representation. In our view, some more concrete indicia of an actual conflict of interest should be present in order for a Sixth Amendment violation to be found. Once such a conflict of interest is found, the nature of the showing of prejudice, if any, that must be made raises a quite separate issue.

conflict" resulting from the joint representation.[4] Thus, although we believe there was no Sixth Amendment violation here, the Court may wish to hold this case pending the decision in *Cuyler* v. *Sullivan* and to dispose of it in light of the decision in that case.

2. Petitioner also argues (Pet. 20-27) that the court of appeals should have dismissed the indictment against him on double jeopardy grounds. The error

[4] Use of the terms "potential," "possible," and "actual" conflict of interest may generate unnecessary confusion. In general, we would think that the term "potential" or "possible" conflict of interest would ordinarily be applicable at the outset of the representation, when the likelihood of an actual conflict arising cannot be accurately predicted. After trial, however, it would be feasible, given complete information, to determine whether an actual conflict of interest was present. The more difficult question would be whether that conflict had affected counsel's conduct, and thereby prejudiced the defense. But if a possible or potential conflict identified at the outset failed to ripen into an actual conflict, there would clearly have been no Sixth Amendment violation.

Thus, when used on appeal of a conviction, the term "possible" conflict of interest would not appear to be an independent standard, but rather a description of the strength of the showing the defendant must make that his lawyer labored under an *actual* conflict of interest. For example, while a defendant or a court might speculate in any case that the mere failure to call a co-defendant could "possibly" have been due to a conflict of interest, a greater showing should be required before a court can infer the existence of an *actual* conflict giving rise to a Sixth Amendment violation. As pointed out above, if the mere failure to call a co-defendant to testify—the only showing made by petitioner here—demonstrates a "possible" conflict requiring reversal without any specific allegations of the reasons for not calling the witness, to what he could have testified, or any other factors that might be probative of an actual conflict, an automatic reversal rule would result.

in the prosecutor's summation at the first trial that resulted in the district court's granting a new trial was so serious, petitioner contends, that the prosecution should not have been allowed to try him a second time.

In closing argument in the first trial, the prosecutor noted that petitioner had placed his initials, "R.H.M.," on his garbage can. The prosecutor argued that these initials stood for "Rodolfo Herrera-Medina." As the court of appeals noted, this argument was justified by the evidence, because one of petitioner's co-conspirators had identified his source of heroin as "Herrera" (Pet. App. A7). Because the name "Herrera" had previously appeared in the local media in connection with narcotics trafficking, petitioner's counsel moved for a mistrial based on the prosecutor's reference to his name. The trial court criticized the prosecutor's argument but denied the motion for a mistrial at that time. After the jury returned a guilty verdict, the court granted petitioner's motion for a new trial, based on the prosecutor's reference to the name "Herrera" in his rebuttal argument. The court stated that while the argument was sufficiently prejudicial to warrant a mistrial, "we do not find government counsel's conduct to be either grossly negligent or intentional" (Pet. App. A9). Accordingly, the court denied petitioner's motion to dismiss the indictment on double jeopardy grounds (Pet. App. A7-A10).

The court of appeals noted that the prosecutor's statement was "an isolated incident and was at least

arguably based on evidence at trial" (Pet. App. A10). Accordingly, the court declined to overturn the trial court's determination that the prosecutor's statement was not so overreaching or so grossly abusive as to preclude a second trial (*ibid.*).

When the court denies the defense's motion for a mistrial and later grants the defendant's motion for a new trial following the return of a verdict of guilty by the jury, the Double Jeopardy Clause does not bar retrial. *United States* v. *Dinitz*, 424 U.S. 600, 610 (1976); *United States v. Ball*, 163 U.S. 662 (1896). In such a case, the defendant's " 'valued right to have his trial completed by a particular tribunal' " (see *Arizona* v. *Washington*, 434 U.S. 497, 503 (1978), quoting *Wade* v. *Hunter*, 336 U.S. 684, 689 (1949)) has been protected.[5]

Moreover, the prosecutor's comment, if error at all, was hardly the kind of grossly improper argument that can only have been intended to provoke a mistrial. This Court has stated on several occasions that if a prosecutor intentionally provokes a mistrial in the hope of obtaining a more favorable jury on retrial, the Double Jeopardy Clause might require dismissal of the indictment. See *United States* v. *Tateo*, 377 U.S. 463, 468 n.3 (1964); *United States* v. *Dinitz*, *supra*, 424 U.S. at 611; *Arizona* v. *Washington*, *supra*, 434 U.S. at 507-508. But the error in this case does not even remotely approach this mag-

[5] Thus, the court of appeals erred (Pet. App. A9 n.5) in equating, for Double Jeopardy purposes, petitioner's motion for a new trial and the mistrial involved in *Dinitz*.

nitude. Both the district court and the court of appeals found the prosecutor's comment not to have been either grossly negligent or intentional (Pet. App. A9-A10), and nothing in the nature or circumstances of the comment suggests that this determination is incorrect.[6] Accordingly, there is no basis for holding that the Double Jeopardy Clause was violated by petitioner's retrial.

CONCLUSION

The petition for a writ of certiorari should be denied or, in the alternative, held pending the disposition of *Cuyler* v. *Sullivan*, No. 78-1832.

Respectfully submitted.

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JANUARY 1980

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[6] Petitioner relies (Pet. 21) on the district court's statement during trial that the prosecutor "deliberately tried to prejudice the jury" by referring to petitioner's name. As the court of appeals pointed out, however, that comment was made "spontaneously and without giving the Government an opportunity to reply to the defendant's mistrial motion" (Pet. App. A9). The court's remark was effectively amended by the court's subsequent finding that the prosecutor's conduct was neither "grossly negligent [nor] intentional" (*ibid.*).

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RODOLFO MEDINA-HERRERA,

Petitioner,

vs.

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Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

REPLY MEMORANDUM FOR PETITIONER

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OPINION BELOW

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JURISDICTION

The judgment of the Court of Appeals was entered on October 1, 1979. A timely petition for rehearing was denied on October 26, 1979 (Pet. App. A13-A14). The petition for a writ of certiorari was filed on November 21, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether petitioner's Sixth Amendment [right to counsel] rights were violated where his retained counsel also represented two (2) co-indictees within the same federal conspiracy indictment and . . . where the court made absolutely no inquiry as to the possibility of prejudice?

1A. Whether the Sixth Amendment right to effective assistance of counsel was violated by the mere possibility, however remote, that a conflict of interest may exist? (Cf., *Cuyler v. Sullivan*, cert. granted, ... U.S. ....., ... S.C. ....., 26 CrL 4002 (1979)?

1B. Whether the Court of Appeals erred in applying the wrong standard as relating to Sixth Amendment conflict of interest [burden on defense counsel to ascertain conflict as opposed to duty upon the trial court to make inquiry where same counsel represented three (3) co-indictees under the same conspiracy indictment]?

1C. Does *Holloway v. Arkansas*, 435 U.S. 475, 98 S.Ct. 1173 (1978), require reversal where prejudice is shown and the trial court made absolutely no inquiry on the subject of conflict of interest?

1D. Whether the above questions require particularly close scrutiny where [as here] neither the petitioner nor the co-indictees spoke English?

1E. Whether certiorari is appropriate to review the Sixth Amendment question in this case where the court below made absolutely no inquiry as to "conflict of interest", particularly in light of the lack of uniformity in the circuits on this question and in light of certiorari being granted in *Cuyler v. Sullivan*, 26 CrL 4002 (1979)?

2. Whether the Double Jeopardy Clause of the Fifth Amendment precluded petitioner from being convicted on retrial . . . where a new trial had been granted based upon the government's closing argument during petitioner's first trial where the trial judge stated: "Although I am going to deny the motion, I think you deliberately tried to prejudice the jury by bringing this out" (and, post-trial, the trial judge granted a new trial solely on the ground of prosecutorial misconduct during closing argument)?

2A. Whether, under such circumstances, was there such deliberate prosecutorial overreaching so that the Double Jeopardy Clause barred retrial?

ARGUMENT

(A)
CONFLICT OF INTEREST

The government suggests, *inter alia*, that:

> "The Court may wish to hold this case pending the decision in *Cuyler v. Sullivan* [78-1832], and to dispose of it in light of the decision in that case" (Gov. Brf. Opp., pg. 9, 12).

Petitioner has pointed out that almost every Circuit, save for the Seventh Circuit, require[d] the TRIAL JUDGE to make inquiry of the defendant[s] regarding the evil where a single attorney represents multiple defendants before the court (e.g., *U.S. v. Donahue*, 560 F.2d 1039 at 1042-44 (C.A. 1, 1977); *U.S. v. Carrigan*, 543 F.2d 1053 at 1055 (C.A. 2, 1976); *Sullivan v. Cuyler*, 593 F.2d 512 (C.A. 3, 1979) (cert. pending . . . 78-1832); *U.S. v. Levy*, 577 F.2d 200 (C.A. 3, 1977); *U.S. v. Truglio*, 493 F.2d 574 at 579 (C.A. 4, 1974); *U.S. v. Alvarez*, 580 F.2d 1251 at 1257 (C.A. 5, 1978); *U.S. v. Lawriw*, 568 F.2d at 102 (C.A. 8, 1977)).

The government points out that courts have reviewed the Sixth Amendment question by inter-changing several words. The government points out that courts have frequently used "potential, possible and actual" while discussing conflict of interest (Gov. Brf. Opp., pg. 9, n.4). This, the government points out, "may generate unnecessary confusion" (ibid).

What petitioner stresses [and the government does not deny] is that the erroneous Seventh Circuit view has been perpetuated since *U.S. v. Mandell*, 525 F.2d 671 (C.A. 7, 1975). *Mandell* put the onus of inquiry . . . NOT

ON THE TRIAL COURT . . . BUT ON DEFENSE COUNSEL. In the present case the Seventh Circuit stated:

> "More important, however, is that the defense counsel to whom WE HAVE ENTRUSTED THE PRIMARY RESPONSIBILITY IN THIS AREA, see *MANDELL, SUPRA*, 525 F.2d at 677, NEVER ALERTED THE DISTRICT COURT IN ANY WAY TO POSSIBLE PROBLEMS WITH JOINT REPRESENTATION" (606 F.2d at 776; emphasis ours).[1]

The *pure* question which *Holloway* seemingly left open and which may now be appropriately answered within the parameters of this federal criminal case is:

> ". . . Second, courts have differed with respect to the scope and nature of the *affirmative duty of the trial judge* to assure that criminal defendants are not deprived of their right to the effective assistance of counsel by joint representation of conflicting interests . . ." (*Holloway*, 435 U.S. 475, 98 S.Ct. at 1178).

Succinctly, the record below shows that a single defense counsel represented three (3) separate defendants in the Federal District Court in Chicago, Illinois under Indictment 77 CR 900. One defendant, Lopez, was a fugitive during petitioner's first trial [February, 1978]. Petitioner stood trial commencing February 14, 1978, while counsel's third client in the same case entered a guilty plea before the same trial judge on the same date. The record reflects *clearly* that defense counsel's third client in this case, Alcantar, the guilty pleading defendant, was a potential trial witness (O.R. 25). We

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[1] Another example of the Seventh Circuit's perpetuation of erroneous constitutional doctrines is found in *Beckwith v. U.S.*, 425 U.S. 341, 96 S.Ct. 1612 at 1614, n. 2 (1976). In *Beckwith* this Court pointed out that the Seventh Circuit, alone, required certain *Miranda* warnings in non-custodial I.R.S. situations (Opinion by Chief Justice Burger).

also point out that at the February, 1978 trial [Trial I] three (3) of the four (4) counts upon which petitioner was being tried were the subject of judgment(s) of acquittal at the close of the government's evidence (O.R. 33). Thus, the jury was deliberating on the remaining conspiracy count under which petitioner and his attorney's two (2) other clients . . . were both charged (O.R. 2). We submit, *aliunde*, that the circumstances described compelled an independent inquiry from the trial judge on conflict of interest.[2] The appropriate A.B.A. Standard states:

ABA, Standards Relating to the Administration of Criminal Justice—The Function of the Trial Judge § 3.4(b), at 171 (1974):

> "Whenever two or more defendants who have been jointly charged, or whose cases have been consolidated, are represented by the same attorney, the trial judge should inquire into potential conflicts which may jeopardize the right of each defendant to the fidelity of his counsel."

The Court of Appeals while affirming petitioner's conviction did not so much as pay lip service to the A.B.A. Standard (606 F.2d at 776) although even the dissenting Justice in *Holloway* urged:

> I would follow the lead of the several Courts of Appeals that have recognized the trial court's duty of inquiry in joint representation cases without minimizing the constitutional predicate of "conflicting interests."[3] (435 U.S. at 475, 98 S.Ct. at 1184).

[2] The potential for prejudice is thus greater by virtue of the court dismissing three (3) of the four (4) counts against the petitioner. Stated otherwise, the government's evidence could not reach any suggested overwhelming status. We point this out notwithstanding the statement in *Glasser*:

> "The right to have the assistance of counsel is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial", 315 U.S. at 75-76.

We note, finally, that both petitioner and his co-defendant at trial [*albeit* entering a guilty plea] Alcantar, both needed an interpreter throughout the proceedings. It may be [that as this record reflects] that the added ingredient of non-English speaking defendants raise the level of necessary inquiry by the trial court when, as here, we are considering a precious constitutional mandate [Sixth Amendment right to counsel].

(B)

DOUBLE JEOPARDY QUESTION

With unmistakeable clarity the trial court told government counsel (Mr. Cook, Esq.) what he thought of part of the government's closing argument at an immediate sidebar following the offensive remarks:

> THE COURT: I think, Mr. Cook, that you came close to committing reversible error.
>
> *Although I am going to deny the motion, I think you deliberately tried to prejudice the jury by bringing this out.* Counsel didn't argue it.
>
> But, I am going to deny the motion at this point, and we can reconsider it at a later time during post-trial motions.
>
> If you can present some cases on it—I don't know— but I am going to deny it at this point. (Tr. 10-11, February 21, 1978)

On May 31, 1978, petitioner was granted a new trial only on the grounds of the government's prejudicial

[3] Mr. Justice POWELL with whom Mr. Justice BLACKMUN and Mr. Justice REHNQUIST join, dissenting.

closing argument (O.R. 46). While granting a new trial [some three (3) months later] the trial court stated:

> With respect to the other question as concerning the prejudicial effect of the argument of counsel, I take a different position. It seems to me that after reading the cases and also the transcript in this case—which I did very carefully—it would be futile to take this case to the appellate court because I just think it would result in a reversal, and therefore I am going to grant a new trial to be held immediately—as quickly as possible—concerning this defendant.[4]

Under such circumstances this Court in *Arizona v. Washington*, stated:

> "As this Court noted in *United States v. Dinitz*, 424 U.S. 600, 611, 96 S.Ct. 1975, 1081, 47 L.Ed.2d 267:
>
> > "The Double Jeopardy Clause does protect a defendant against governmental actions intended to provoke mistrial requests and thereby to subject defendants to the substantial burdens imposed by multiple prosecutions. *It bars retrials where "bad-faith conduct by judge or prosecutor* '. . . threatens the '[h]arassment of an accused by successive prosecutions of declaration of a mistrial so as to afford the prosecution a more favorable opportunity to convict' the defendant."
>
> Thus, the strictest scrutiny is appropriate when the basis for the mistrial is the unavailability of critical prosecution evidence, or when there is reason to believe that the prosecutor is using the superior resources of the State to harass or to *achieve a tactical advantage over the accused.*" (98 S.Ct. at 831-32; ft.nts. omitted; emphasis ours)

[4] Transcript of May 31, 1978. This date [May 31, 1978] becomes interesting in that defense counsel's second client, Alcantar, is sentenced by the same trial judge to eight (8) years in custody on the same date. The separate transcripts of proceeding were supplemented to the original record in the Seventh Circuit.

The trial court ameliorated his earlier comments while denying post-conviction relief on September 14, 1978 (O.R. 64). Nevertheless, it is petitioner's view that the spontaneous comments by the trial court reflected a proper characterization of that which occurred at the time it happened. The government offers no citation to authority suggesting that the trial court's spontaneous remarks were less than accurate (Gov. Brf. Opp., pg. 12, n.6).

We also note that *the government* found that the Court of Appeals in this case committed error while equating for double jeopardy purposes, petitioner's motion for a new trial and the mistrial involved in *Dinitz* (Gov. Brf. Opp., pg. 11, n.5). Once again, the government offers no citation to authority for suggesting that the Court of Appeals was in error while equating a motion for a new trial . . . with a motion for a mistrial. Quite to the contrary *Abney v. U.S.*, 431 U.S. 651 (1977) clearly implies that the relief sought is synonymous (in accord, *U.S. v. Martin*, 561 F.2d 135 (CA 8, 1977).

CONCLUSION

The petitioner, as to his argument regarding the conflict of interest in this case, urges that certiorari be granted in conjunction with *Cuyler v. Sullivan*, 78-1832. We thus adopt the government's alternative conclusion as set forth in their brief in opposition, pg. 12. Petitioner on his double jeopardy argument urges independent consideration for certiorari. Thus, petitioner urges that certiorari be granted to review both issues submitted.

Respectfully submitted,

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